

Special Measures Act concerning the New Coronavirus Measures

—A Signpost to the Act on Special Measures for Pandemic Influenza and New Infectious Diseases Preparedness and Response and the Administrative Law —

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This paper will continue to examine the government's legal system for the new coronavirus measures from a public policy perspective. This time, we will discuss its approach as a legal system and its measures such as public announcement. It should be noted that the operation of the Special Measures Act by the national and local public organizations (hereinafter referred to as the "government") is constantly changing and that the opinions in this paper are my own.

I Was the approach appropriate for a legal system?

This paper is entitled "Special Measures Act concerning the New Coronavirus Measures." The expression is somewhat unfamiliar, and because of this, the news media has often come to refer it simply as the "Special Measures Act." The reason why we have to use such a roundabout expression is that the official name of the legal system is the "Act on Special Measures for Pandemic Influenza and New Infectious Diseases Preparedness and Response." This Act was promulgated on May 11, 2012, to protect the lives and health of the people and to minimize the impact on their daily lives (Article 1) by strengthening the countermeasures through the implementation plans and emergency measures against the new influenza strain, which were defined based on the H1N1 subtype influenza pandemic in 2009. The Act has never been applied since its enforcement in April 2013. However, due to the recent threat of the COVID-19 pandemic (hereafter, "new coronavirus"), some amendments were made to regard the virus as a new influenza strain for the time being. The revised Act took effect on March 14, 2020 ("Special Measures Act").

The H1N1 subtype influenza spread in 2009 and infected over 7,500 people in medical institutions and social welfare facilities. In contrast, the number of people infected with the new coronavirus has reached 424,000 as of February 22, 2021. As these data show, as a legislative fact, the new coronaviruses appear to have far outpaced new influenza. However, as a legislative response, it is incorporated into the framework that was to deal with the new influenza.

Of course, it was difficult to completely foresee how the coronavirus would spread when the outbreak first occurred, and in this sense, there is an aspect of hindsight. However, this case can be seen as a rather extreme manifestation of one of the aspects that public policymakers tend to fall into, which is why we took it up.

Generally speaking, there is always an idea that if a new event can be dealt with by flexible application or partial amendment of the existing legal system, it should be done so. The author calls such an idea in legislative function as "legislative incrementalism." Incrementalism is a way of thinking (model) developed by Charles Lindblom (C.E. Lindblom) as a behavioral pattern of policymakers. It is based on his observation that, mainly in government agencies' budgeting process, rigorous assessments are made only for new increments based on the previous year's budget. Lindblom points out that common behavioral patterns of policy makers are mainly characterized by the following. (1) They begin to formulate a policy proposal, not to get closer to an ideal goal but to eliminate imminent real-world harm. (2) Their search for a policy proposal begins with the one that has slight modifications in the current operating practices. (3) Instead of attempting to solve all the immediate problems at once, they try to solve them progressively by repeatedly modifying and changing the policy. (4) Their search for a policy proposal ends when they find two or three feasible options and that they are satisfied with selecting the one they think is best within this range.

The author considers that such an idea of incrementalism in the policy-making process may be used not only in the

budgeting process but also in situations where it is necessary to take legislative measures in response to policy issues (agendas). In Japan's case, draft laws are often proposed by the Cabinet, so it is appropriate to consider the policy formation process by dividing it into the administrative phase and the legislative phase. Firstly, in the administrative phase, when the Cabinet proposes the draft law, the Ministry and other agencies that formulate the draft law based on the affairs under its jurisdiction undergo a careful legal review of the draft law's content at the Cabinet Legislation Bureau. In this legal review process, the law is thoroughly examined from the perspective of one, "whether it is necessary to formulate a purely new law" and two, "whether it is possible to deal with the problem by partial amendment of existing laws." The purpose of such legal review is to pursue efficiency in terms of legal economy (not drafting useless laws), to ensure consistency with existing laws (avoiding overlapping laws), and to control expenditure on law enforcement, and underlying this is the idea of incrementalism. This idea can easily lead to a stance (on legislative policy) where only truly necessary measures should be taken progressively, and without unnecessarily expanding the circle of measures.

Next, after the Cabinet decision, the draft law is submitted to the Diet for deliberation. While the Diet deliberates on the pros and cons of the measures, the government and the ruling party proposing the draft law needs to prepare a draft law that can withstand the severe questioning on whether the measures are excessive (including excessive contents that violate the principle of proportionality) or is insufficient (lack of contents and low effectiveness). Due to this structure of the policy formation process of the administrative and legislative branches, there is a preference towards partial amendments to existing laws, primarily based on the above idea of incrementalism (1) to (3), rather than a purely new law with a high risk of excessive or insufficient contents.

Then, in hindsight, what should have been done? The following points are mentioned as differences between the new coronavirus and new influenza. (1) The high asymptomatic rate in case of infection, (2) long incubation period and duration of symptoms, and (3) high fatality rate. In other words, the new coronavirus disease is more likely to spread and spread unnoticed than the new influenza.

In light of this, it would have been possible to set measures with certain expected effects as original regulations in March 2020. Establishment of "priority areas for spread prevention measures" formulated by the partial amendment of the Special Measures Act (February 2021), shorter business hours, request/compensation for temporary closure and related actions, measures concerning residents' trans-prefectural or more expansive movements are examples of such measures. The author is not criticizing the individual responses but rather believes that we should utilize these experiences as material for reflecting on the concept of incrementalism, which has a restraining effect on planning diverse content.

II What is "public announcement" as an administrative measure?

1 Introduction

Although the Special Measures Act was partially amended on February 3, 2021, Article 45 (2) before the amendment provided that the specified prefectural Governor may request the manager of a facility used by a large number of people to restrict or suspend the use of the facility or to suspend or restrict the holding of events. The Act further stated that if the facility manager refuses to meet such requests without a valid reason, the Governor can instruct to take the measures concerning the request (Art.45 (3)), and the Governor, when having instructed, must issue an announcement to that effect (Art.45 (4)).

In other words, based on Article 45, (1) when actually making a "request," it is possible to do so, specifying the individual facility manager, and (2) if the facility manager and the like does not comply, it is possible to give "instructions" that will result in a legal obligation to perform. The instruction here means to show a policy, standard, procedure, and the like for a specific action and have it carried out. The party receiving the instruction is legally obligated to fulfill the instruction. Furthermore, although the instructions did not carry penalties, it was believed that they could exert *de facto*

influence by publishing the businesses' names. However, some stores continued to operate in reality despite the public announcement of the instructions regarding the request for shorter hours. Some have called for strengthening the effectiveness of the Special Measures Act.

Now, let us consider the nature of the administrative means of public announcement. There have been various debates over the public announcement as an administrative measure. For example, one of the ideas is to classify public announcement into three categories according to its nature: (1) public announcement as a sanction, (2) public announcement to ensure effectiveness, and (3) public announcement as information provision. The outline is as follows.

- (1) Public announcement as a sanction; For example, Article 7 of the Act on Specified Commercial Transactions stipulates that when a seller violates the provisions for clearly indicating the name, purpose, and so on in door-to-door sales, the competent minister may instruct the necessary action, and when having instructed, the competent minister must publish to that effect. In the case of this category, public announcement is a measure that targets acts of violation against laws and regulations and has a nature of sanction for such violations.
- (2) Public announcement to ensure effectiveness; For example, Article 20 of the Act on the Promotion of Sorted Collection and Recycling of Containers and Packaging stipulates that the competent minister may make a recommendation to a business operator that does not recycle without a justifiable reason, and when the recommendation is not followed, the competent minister may make a public announcement to that effect. In the case of this category, the target is the case where the business operator does not follow the administrative guidance as a factual act without going as far as violating laws and regulations. The measure is intended as a softer means than a sanction for the administrative agency to encourage such a business operator to follow the administrative guidance. Therefore, we can distinguish it from (1) in the above and position it as a means of ensuring the effectiveness of administrative activities. Also, since (1) and (2) in the above involve the nature of infringing administration for business operators, authorization by law is considered necessary based on the principle of administration based on law. In this sense, (1) and (2) are considered equivalent to sanctions in a broad sense.
- (3) Public announcement as information provision; Article 63 of the Food Sanitation Act stipulates that the Minister of Health, Labour and Welfare, etc., shall make public the names, etc., of persons who have violated dispositions under this Act and shall endeavor to clarify the situation of food sanitation hazards. As is clear from the wording, there is no intention to sanction the operator in this case but rather to prevent the spread of damage from food poisoning by informing the public of the names of those operating in violation. Such a category is different in character from (1) and (2) in the above and is positioned as a category that has the character of "public announcement as information provision."

2 Background

The following summarizes the background of the public announcement as an administrative measure.

- (1) The instructions and public announcements based on Article 45 of the Special Measures Act before the amendment are considered measures equivalent to (2) in the above, which encourages compliance with administrative guidance in jurisprudential classification.
- (2) However, when we look at the system's actual operation, it seems to be understood by the administrative officials as a sanctioning measure in a broad sense. We can cite the following facts as evidence.
 - a. In the Emergency Response Policy (April 11, 2021) established by the government based on the Special Measures Act, it is stated as follows. "Specified prefectures will request restrictions, etc., on the holding of events that may lead to the spread of infection, based on Article 24(9) and Article 45(2) of the Act. (Omission) When making a request, etc., in these cases, the first step shall be to request cooperation based on Article 24(9) of the Act. If the request is not

met without any justifiable reason, the second step shall be to request based on Article 45(2) of the Act, followed by instructions under Article 45(3) of the Act, and then these requests and instructions shall be made public.” In this context, the understanding would be that the prefectural Governors gradually increase their public outreach to business operators and reinforce the influence of their outreach through the administrative means of public announcement. Therefore, looking at such treatment, it is hard to eradicate the aspect that administrative agencies have treated public announcement as a means of sanction in a broad sense (at least, it appears different from the measures for information provision of (3) in the above).

- b. It is reported that, upon announcement, one Governor commented, “We cannot take any further action. As the party who issued the order, I feel frustrated. We hope the stores will cooperate with us even from tomorrow . As seen in news reports such as those entitled “Refusing Business Suspension Request will Publicize Your Store Name,” there is no denying that the idea of public announcement as a means of sanction in a broad sense was prevalent.
- (3) In the field of public policy studies, public announcement as a means of sanction in a broad sense is positioned as belonging to the psychological method of administrative means. Unlike regulatory methods or economic incentives (e.g., subsidies), psychological methods are considered one of the methods called ‘nudge’ that guide people’s behavior in the right direction without coercive government interference. Specifically, it is a method that takes advantage of the people’s psychology, such as “Since the Governor is announcing the name, the restaurant seems to have at least a public health problem. I will refrain from visiting, and so will everyone else.” This method has two advantages; (1) low cost because it uses social condemnation and peer pressure from the public, and (2) little friction with private citizens for administrative agencies because it is not easy to make it a subject of administrative disputes.
- (4) However, generally, it may be hard to make social condemnation effective if most people become sympathetic to the person’s activities in question. In other words, there may be a case in which the general public does not feel a solid ethical malignancy (reason for criticism) about the actions of the business operators who continue their business activities despite receiving instructions. It can cause adverse effects, such as sympathy, “We feel sorry, so we want to support them,” or an adverse idea such as, “Since the neighboring stores are closed, let us go to this store instead,” attracting even more people. Such phenomena can occur when the majority considers that the business activities by themselves do not have a high element of causing visible social harm, such as those of pachinko parlors. Of course, the probability of infection increases in the operation of pachinko parlors as they attract customers. However, compared to the activities of the stores that violated the Food Sanitation Act mentioned above, the danger and reasonableness of blame are generally perceived as relatively low.

On the other hand, there is a possibility that some people will attempt to sanction the businesses that have been the subject of the public announcement as a self-help measure (activities equivalent to the so-called “self-restraint police” are equivalent to this) or means of vigilantism.

In short, the government’s psychological methods have an element of uncertainty in their effectiveness, and this case is a symbolic manifestation of this fact.

- (5) In April 2020, Osaka, Fukuoka, and Aichi prefectures announced the names of the stores that did not comply with the business suspension closure request under the Special Measures Act one after another. However, it has been reported that some stores continued to operate even after the public announcement.
- (6) In light of this situation, from around June 2020, government officials also commented on the need to revise the Special Measures Act to increase its effectiveness. Moreover, in January 2021, the Subcommittee on Novel Coronavirus Disease Control discussed the necessity of developing a system to increase business suspension requests’ effectiveness.
- (7) Based on this background, a partial amendment to the Special Measures Act was compiled by the government at the

beginning of 2021. After discussions and modifications between the ruling and opposition parties, it was enacted on February 3 of the same year. In this partial amendment (hereinafter referred to as “the amendment”), the prefectural Governor may issue an administrative order instead of an instruction and may make a public announcement to that effect. The administrative order violators are also subject to a non-penal fine of up to 300,000 yen as administrative penalty (see the table for an overview of the amendment).

<Table>

Law		Current law		Idea behind the partial amendment		
Subject		Government headquarters head (Prime Minister)	Prefectural headquarters head (governor)		Government headquarters head (Prime Minister)	Prefectural headquarters head (governor)
Normal time	Normal time	Authority of comprehensive coordination (Article 20)	Authority to make comprehensive adjustments in the area (Article 24 (1))		Establishment of priority measures to prevent the spread of disease; public announcement of the period and area where the measures are implemented if an emergency situation is unavoidable without such an announcement	The period and area specified by the governor.
			Public and private organizations and individuals; request for cooperation (Article 24 (9))			• Request to change facility's business hours, etc.
			Request to provide medical care (Article 31)			• Order, announcement, and non-penal fine • Establishment of temporary emergency medical facilities
	Situations in a state of emergency declaration	State of Emergency Declaration (Article 32), etc.	Request for staff dispatch (request for assistance to other government agencies, etc. (Article 42))			
			Request to refrain from going out (Article 45 (1))			
			Request for cooperation (Article 45 (1))	Examples: (1) (For residents) Refrain from non-essential outings and transport, especially after 8 p.m.		
				(2) (For events): Within 50% capacity. 2m or more spacing, etc.		
				(3) (For restaurants): Shorter business hours. Until 8 p.m.		
			Instruction, disclosure (Article 45 (3)-(4))	Instruction; must be made public; some did not comply even with such announcements.		Administrative order if request is not fulfilled; non-penal fine for breaches; the governor may issue an announcement.
	Support	—	The government and municipalities shall effectively take the necessary financial and other measures to support business operators to mitigate the impact on business management and the people's lives and stabilize them.			
				Passed on February 3, 2021.		

3 Positive aspects of the amendment

The debate over the amendment's content, such as which of administrative penalty and administrative punishment is more appropriate and if the amount of administrative penalty is reasonable, were reported in detail every day and attracted a great deal of attention. This brings us back to the ultimate question in legislative policy on the new coronavirus measures: “Which should the government focus on, the lives of the people or the economy?”

If we put aside such an extreme question for discussion some other time and focus on the public policy approach

in the partial amendment, the author considers that the following points to be worthy of evaluation.

- (1) While the public announcement that utilizes psychological methods has the merit of being a low-cost and low-friction administrative means, they are also easily affected by the sympathies held by the majority of the general public. Therefore, when faced with an unprecedented threat in terms of the scope and scale of damage, as in the recent coronavirus pandemic, public announcement is not necessarily an administrative measure that can be estimated. For this reason, we can expect the revised set of measures to “request, administrative order, non-penal fine, and public announcement as necessary” to be more reliable and effective as a means of ensuring the fulfillment of administrative obligations than the set of measures to “request, instruction, and public announcement” before the amendment.
- (2) As for the choice of the administrative penalty instead of administrative punishment and the revision of the upper limit of the non-penal fine from 500,000 yen to 300,000 yen made in the discussions between the ruling and opposition parties, the author believes that the standard has settled at a reasonable level in terms of balance with other systems.

4 Issues of the revised Special Measures Act

In this regard, we will touch on the policy indicated by the government in the enforcement notice of the amended Special Measures Act (February 12, 2021) regarding the handling of public announcements. The notice states as follows.

8. Request for cooperation in preventing infection related to emergency measures, etc. (Art.45 of the Act) (excerpt)

(5) Public announcement upon making a request under Art. 45(2) or an order under Art.45(3) of the Act (Art.45(5))

“The public announcement of a request or order to restrict facility use in an emergency was stipulated because it is critical to inform users, etc., widely in advance. The purpose is not to impose sanctions but to ensure that the users behave rationally. Therefore, it is necessary to consider the impact of such public announcements so that they do not become counterproductive in preventing the spread of infection or cause slanderous acts, etc. It is also assumed that public announcements may not ensure users' reasonable actions, such as attracting even more users. Thus, we have revised Art.45(5) of the Act from ‘must issue an announcement’ to ‘may issue an announcement.’ Please note that in such cases, it is possible not to publish the information.”

The following points are clear from this notice. Firstly, the State emphasizes that the nature of the public announcement in the Special Measures Act is information provision, not sanctions in the broad sense as mentioned in the above. Secondly, the State acknowledges that the psychological administrative means of public announcements may have different effects than initially intended by the administrative agency and calls for prudence in the policymaking.

Concerning these points, the author believes that it is difficult to think that the said public announcement excludes the element of sanction in a broad sense and that it is somewhat unreasonable to position it in the category of having the character of ‘public announcement as information provision’ only.

However, the author finds it positive that the government recognizes the need for careful consideration of the use of administrative means as psychological methods in the face of such unprecedented social events. The author believes that it raises an important question not only for the administrative agencies but also for the people who live their lives in this nation as they gain experiences and consider what administrative measures are desirable.

Reference Article: Act on Special Measures for Pandemic Influenza and New Infectious Diseases Preparedness and Response (extract)

(Purpose)

Art.1.

This Act, taking it into consideration that, seeing most of the people have not been immunized against the new-type flu or any other novel infection at the moment, it is feared that not only would a disease spread rapidly throughout the country,

and its symptoms are severe if infected, that a serious influence is exerted on lives and economy of the nation, is aimed at the protection of the life and health of the people as well as the minimization of the influence at its outbreak through the build-up of countermeasures thereagainst below by providing for—

- (a) plans for the implementation of NTFNI measures;
- (b) countermeasures at the said outbreak;
- (c) priority measures to prevent the spread of the said strains;
- (d) emergency measures; and
- (e) other special measures in terms of matters concerning such an infection, combined with the Act to Prevent Catching Diseases and to Give Medical Care to Infectious Cases (1998 act No.114 — hereinafter called “the Infectious Disease Act”) and other statutes concerning the prevention of the occurrence and spread of the above infection.

Art.24.

- (1) Any prefectural commander may make comprehensive adjustments to NTFNI measures to be implemented by the prefecture, relevant municipalities and assigned POs, and named LPOs when thinking it vital for the purpose of the accurate and prompt implementation thereof within its limits. (Omission)
- (9) Any prefectural commander may make to a public or private body, or individual a request for cooperation necessary for the accurate and prompt implementation of NTFNI measures within the limits of the prefecture.
(Request for cooperation in preventing the spread of infection)

Art.45.

- (1) Any Governor may in a new influenza, etc. emergency make to its inhabitants a request for stay in their residences or other places equivalent thereto and other cooperation necessary to prevent them from being caught by the flu or novel infection in or during areas and a duration of time fixed by the Governor in consideration of a period of incubation thereof or recovery therefrom, and the situation of its occurrence, except as it is indispensable for their supporting themselves, when thinking it vital for preventing the spread of infection, the protection of the people’s life and health, and the avoidance of the disruption the lives and economy of the nation.
- (2) Any Governor may in the event of novel influenza or other emergency situations, request persons that manage schools, social welfare institutions (limited to what are available for day care or short-stay services), performance halls (which mean such facilities as defined in section 1.(1) of the Entertainment Facilities Act (1948 act No.137) or any other such establishment used by a large number of people as stipulated by a cabinet order or that promote events by their use (in the next paragraph and Art. 72 (2), called “facility managers and the like”) within the limits of the prefecture to—
 - (a) restrict or suspend the use of the said establishments or the holding of said events; or
 - (b) make any other such move as will be laid down in a cabinet order, during a duration of time fixed by the Governor in consideration of a period of incubation or recovery of or from the flu or novel infection, and the situation of its occurrence when thinking it vital for the prevention of its prevalence, the protection of the people’s life and health, and the avoidance of a confusion of national living and economy.
- (3) In the case in which a facility manager or the like refuses to meet such a request as grounded on paragraph (2) without good reason, the Governor may order him to make the move or moves concerned only where it is particularly necessary with a view to prevent the prevalence of the flu or novel infection, to protect the people’s life and health, and to avoid a confusion of national living and economy. (Omission)
- (5) If the Governor requests or orders as stipulated on the regulations of (2) and (3) respectively, such a fact may be publicly announced.